In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1043

JERRY M. COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-12a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1968. (Pet. 13a.) On January 13, 1969, Mr. Justice White granted petitioner an extension of time until February 16, 1969, within which to file a petition for certiorari (Pet. 14a). The peti-

tion for a writ of certiorari was filed on February 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence used at petitioner's trial for tax evasion and willful failure to file returns was obtained from him in violation of his constitutional rights because the investigating special agent of the Internal Revenue Service did not describe his inquiries as a criminal investigation and did not advise petitioner of his rights under the Fifth and Sixth Amendments.

STATEMENT

After a jury-waived trial petitioner was convicted on three counts of willful failure to file individual income tax returns for 1960, 1961, and 1962, in violation of Section 7203 of the Internal Revenue Code of 1954, and eight counts of knowingly filing false employer's quarterly tax returns for 1961 and 1962 in violation of Section 7201 of the Code. (II-Tr. 131-136; Pet. 1a).[1] The court of appeals affirmed.

The sole question presented is whether the district court erred in failing to exclude evidence obtained from petitioner by Internal Revenue Service agents, either because it was obtained by deceit or because sufficient advice concerning constitutional rights was not given.

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[1] "I-Tr." will be used to refer the transcript of proceedings on the motion to suppress evidence, and "II-Tr." to refer to the transcript of trial proceedings.

Special Agent Heinz testified [2] that his first contact with petitioner was by telephone on August 19, 1963. He told petitioner that he was a special agent with the Intelligence Division, that it was his duty to check "irregularities" in taxes, and that the Internal Revenue office in St. Louis, Missouri, had no records showing that he had filed income tax returns. He asked petitioner in what district he had filed his returns. Petitioner did not answer the question, but said that he was going out of town and that he would see Heinz on September 9, 1963. (I-Tr. 1-3, 10-11; II-Tr. 16-17, 37-38.)

On September 9, 1963, Heinz and agent Reising of the Audit Division went to petitioner's office by appointment. They produced their credentials for petitioner and again told him that the St. Louis office had no record of his having filed personal income tax returns and that they wanted to know where such returns had been filed. Petitioner replied that he had previously filed returns in Detroit but had failed to file returns for 1960, 1961, or 1962. (I-Tr. 4-5; II-Tr. 19-20.) Until then, Heinz did not know that petitioner had not filed income tax returns for the years in question anywhere, and he did not know whether any income tax was due, whether there was any unreported income, or that false quarterly employer's tax returns (Form 941) had been filed by petitioner.

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[2] Petitioner did not testify, either at the trial or at a pretrial hearing on his motion to suppress evidence; the only testimony relevant to the issue presented was that given by the two Internal Revenue Service agents involved.

(I-Tr. 24-27; II-Tr. 19). Heinz told petitioner that Reising had been assigned to make an audit of petitioner's tax liability, and Reising then discussed with petitioner the records which would be needed for an audit. (I-Tr. 6-7; II-Tr. 49.)

At the first meeting petitioner produced no records but said that he would do so. On September 26, 1963, petitioner turned over to the agents his sales ledger and some check stubs. (I-Tr. 7-8; II-Tr. 21-22.) These records showed gross receipts and wages paid. (II-Tr. 40-41.) On March 30, 1964, petitioner turned over more records. (II-Tr. 22-23.) On June 3, 1964, at a meeting at petitioner's office, Heinz asked petitioner why he had not filed income tax returns, first warning petitioner that he was not required to reply if the answer might incriminate him. Petitioner replied that he understood and that he saw no objection to answering, and stated that when he started in business he did not have enough money to pay the taxes "and later on he just got careless and continued not to file". (II-Tr. 24-25.)

Petitioner brought more records to the agents, at their office, in September, 1964, and in February, March, and September, 1965. (II-Tr. 25-31.)

On January 29, 1965, Heinz requisitioned from Internal Revenue Service files petitioner's quarterly employer's returns (Form 941). (II-Tr. 99.) Subsequently, on August 10, 1965, at the Internal Revenue Service office, Heinz showed petitioner those returns and asked him where he obtained the figures for them, first warning petitioner again of his privilege against self-incrimination and telling him that there were

discrepancies. (I-Tr. 18-19; II-Tr. 28-30.) Petitioner replied that at first he could pay only a small amount and reported whatever he could afford to pay, and that later he continued to do the same thing. (II-Tr. 30.)

After a decision in favor of criminal prosecution had been made by Internal Revenue, a letter was sent to petitioner giving him an opportunity to come in for a conference and advising that he could bring an attorney. Petitioner came without an attorney on April 6, 1966, and was advised only of his privilege against self-incrimination. (I-Tr. 22, 30; II-Tr. 32-35, 51, 92-94.)

ARGUMENT

In substance, petitioner contends (Pet. 8-15) that his disclosures to revenue agents were not made freely or voluntarily (1) because the investigation was represented as an ordinary tax audit and the alleged purpose to gather evidence to prosecute him was not revealed and (2) because he had not been given the warnings prescribed for custodial interrogation in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court of appeals correctly rejected both contentions.

1. The record gives no support to the contentions that petitioner was deceived about the possibility of criminal prosecution, and that the Internal Revenue agents attempted to deceive him.

It is difficult to believe that anyone who had failed to file his income tax returns for three years would not recognize that any audit by Internal Revenue

agents might result in criminal prosecution.[3] Certainly, the telephone call on August 19, 1963, from agent Heinz, who explained that he was a special agent of the Intelligence Division with a duty to investigate "irregularities" in income tax matters, inquiring where petitioner had filed his returns, since the records at St. Louis showed none, was not intended to deceive petitioner concerning the possibility of criminal prosecution. Indeed, petitioner may have sought the delay to September 9, 1963, in order to consider how he should deal with the investigation. At his own office, on the appointed day, petitioner acknowledged that he had filed no returns. (I-Tr. 1-5, 10-11; II-Tr. 16-20, 37-38.) Although petitioner was not told that he could refuse to answer, he obviously had decided that the best tactic was to cooperate rather than to obstruct.

Petitioner attempts to conjure up a picture of deceit by asserting (Pet. 8-9) that Special Agent Heinz, at the September 9 meeting, falsely represented that petitioner's records were "sought for the use of a Revenue Agent in conducting a customary audit to determine tax liability" when allegedly the "real purpose" was to serve a criminal investigation. This is a tortured description of the undisputed facts. In a

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[3] Although petitioner did not testify at trial in a presentence plea, petitioner's counsel told the court (II-Tr. 128): "Several years later when the business started to show some profit, he had not filed a return during the bad years, it was a question of him panicking and afraid he was going to be discovered, and continuing along this line of not filing the return."

joint investigation, the agent from the Audit Division (here, Reising) has the duty of auditing the taxpayer's books. (I-Tr. 34-37.) Heinz correctly told petitioner that agent Reising would make the audit. It is entirely unreal to suppose that an average taxpayer,[4] knowing that he has violated the revenue laws, assumes that an inquiry by a revenue agent, of whatever kind, carries with it any guarantee that civil liability will be the only consequence. See *Turner* v. *United States*, 222 F. 2d 926, 931-932 (C. A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Frank*, 245 F. 2d 284, 286 (C. A. 3); *United States* v. *Sclafani*, 265 F. 2d 408, 414-415 (C. A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Squeri*, 398 F. 2d 785, 788 (C. A. 2).

2. Petitioner also contends that the full *Miranda* warnings should be required in tax investigations. However, the courts of appeals have unanimously rejected the contention that *Miranda* warnings are required in non-custodial and non-coercive tax investigations, and this Court has repeatedly denied certiorari to review the question. See, *e.g.*, *Muse* v. *United States*, 69-1 U.S.T.C., par. 9133 (C. A. 8), certiorari denied, March 3, 1969, No. 951, O.T., 1968; *United States* v. *Squeri*, 398 F. 2d 785 (C. A. 2); *Schlinsky* v. *United States*, 379 F. 2d 735 (C. A. 1), certiorari denied, 389 U.S. 920; *Spinney* v. *United States*, 385

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[4] Taxpayer evidently was not of below-average intelligence, since he was the proprietor of a business having gross receipts of about $180,000 per year (II-Tr. 106, 111-112) and was fully alert to the dangers involved in failing to file returns (II-Tr. 128).

F. 2d 908 (C. A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mackiewicz*, 401 F. 2d 219 (C. A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso*, 378 F. 2d 612 (C. A. 4), certiorari denied, 390 U.S. 955; *United States* v. *Maius*, 378 F. 2d 716 (C. A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield*, 381 F. 2d 961 (C. A. 7), certiorari denied, 389 U.S. 1015; *Frohmann* v. *United States*, 380 F. 2d 832 (C. A. 8), certiorari denied, 389 U.S. 976; *Kohatsu* v. *United States*, 351 F. 2d 898 (C. A. 9), certiorari denied, 384 U.S. 1011. No sufficient reason appears for reaching a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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